No. 16,104

United States Court of Appeals

For the Ninth Circuit

States Marine Corporation of Delaware, a corporation, *Appellant,*

vs.

Victory Carriers, Inc., a corporation, and Shipowners & Merchants Towboat Co., Ltd., a corporation, Claimant of the Tug Sea Scout, *Appellees,*

and

Shipowners & Merchants Towboat Co., Ltd., *Appellant,*

vs.

Victory Carriers, Inc., a corporation, *Appellee.*

REPLY BRIEF OF APPELLANT STATES MARINE CORPORATION OF DELAWARE.

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Subject Index

Table of Authorities Cited

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I

REPLY TO VICTORY CARRIERS' BRIEF

Red Stack Is Not Liable to Victory Carriers for Pilot Negligence

"The time has come," the Walrus said,
"To talk of many things:
"Of shoes — and ships — and sealing wax
"Of cabbages — and kings —
"And why the sea is boiling hot —
"And whether pigs have wings."

Through the Looking-Glass, Lewis Carroll

But that is another story.

Plain Tales, R. Kipling

Victory Carriers' brief discusses many things skillfully but with greater skill avoids mentioning Clause 26 of the charter party, "Owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account." Victory Carriers' silence does not accomplish its wishful purpose of striking the clause from evidence. Such silence does, more eloquently than an express admission, demonstrate that Victory Carriers' position cannot survive consideration of the plain language of its contractual undertaking.

Victory Carriers concedes (V.C. Br. p. 12 n.3) that the decision of the United States Supreme Court in the *Herd* case (1959) 359 U.S. 297 does not impugn the validity of the principle of cases such as this Court's decision in *Twentieth Century Delivery Service v. St. Paul* (9 Cir. 1957) 242 F. 2d 292 where the prime contract contemplates that its benefit should extend to subcontractors appointed to assist in performing the prime contract.

The broad undertaking of Victory Carriers by its contract in the present case, "to remain responsible for navigation . . . same as when trading for its own account" clearly states a more extensive concession by Victory Carriers than a bare release of liability of States Marine. In the context of a time charter operation it can be read only as meaning precisely what it says, i.e., that Victory Carriers remains responsible for navigation vis-a-vis States Marine and any subcontractors provided by States Marine to assist Victory Carriers in performing its function of navigation—to the same extent, no greater and no less, that would be the case if Victory Carriers were "trading for its own account."

In its Statement of the Case (Br. 5), although going far beyond the record, Victory Carriers argues that it was not necessary for States Marine to order a Red Stack undocking service because there are many independent pilots unrelated to tugboat companies, apparently contending, for the first time, that "if trading for its own account" it would not necessarily have employed a Red Stack undocking service. Let us examine the contention. If States Marine had hired an independent pilot neither States Marine nor the tugboat company would have been liable to Victory Carriers for his negligence. At most Victory Carriers would have had its recourse against the individual pilot, which is the full extent of the recourse it would have had "if trading for its own account,"—a recourse of which it did not avail itself in the present case.

If Victory Carriers had been "trading for its own account" it would necessarily have hired an independent pilot (for whose negligence there would have been no

corporation responsible) or, as it did, (Tr. 79) hire Red Stack in which case the matter of pilot negligence would have been subject to a Red Stack pilotage clause. Victory Carriers hopes in the present case to achieve a windfall recoupment for pilot negligence over and beyond anything that would be available to it if it were "trading for its own account." In so doing it disregards its clear responsibility under its charter party contract—whether the contract be read as contemplating the inclusion of Red Stack, or as authorizing States Marine to contract with Red Stack on behalf of Victory Carriers within the scope of its terms. We submit that the contract does both.

Victory Carriers insinuates (Br. 13) that the assertion of States Marine that it was authorized to and did bind Victory Carriers to a Red Stack pilotage clause is something which was not urged by States Marine in the trial court. States Marine makes no contention on this appeal which it did not make and brief before the trial court. Victory Carriers' quotation (Tr. 37), when read in context, is clearly a statement of States Marine's position, there and here, that the conceded immunity of the time charterer for pilot negligence relates only to vicarious immunity, and that the question of individual responsibility for personal negligence is not presented by the present case. The falsity of the insinuation that States Marine is newly contending that it had agential authority to bind Victory Carriers to a pilotage clause is disclosed by the same document, from which Victory Carriers quotes, i.e., Motion for Reconsideration (Tr. 38), in which States Marine urged "Victory Carriers, Inc. was bound to the provisions of said pilotage clause."

Victory Carriers urges (Br. 14), we know not why, that the liability limitations of the Red Stack pilotage clause must be supported by the consideration of a reduction in Red Stack's rates. On the contrary, the attempted imposition of a pilotage clause by Red Stack is without fear or favor and has been on a take it or leave it basis to all comers (Tr. 68).

On page 13 of its brief Victory Carriers states:

> "If States Marine had no duty vis-a-vis the owners to pilot carefully, this is because the performance of piloting is not its function under the time charter. This does not afford any basis for holding that Red Stack, an independent contractor who had undertaken the job of piloting, had no duty to pilot carefully."

This passage succinctly states the dilemma of Victory Carriers' position. On the one hand Victory Carriers professes, albeit with tongue in cheek, that it was an agnostic stranger to Red Stack and to any contractual arrangements imposed by Red Stack. On the other hand it urges, as it must, that Red Stack having undertaken by contract with States Marine to undock Victory Carriers' ship, was bound to perform the piloting portion of the undocking job in a careful manner. Victory Carriers looks to the undocking contract to assert a claim against Red Stack (after all, it is damage resulting from the negligent navigation of its own manned and powered vessel for which Victory Carriers seeks recompense, Finding IX, Tr. 44), but in so doing conveniently blinds itself to the provisions of that contract.

II

REPLY TO RED STACK'S BRIEF

Red Stack Is Liable to Victory Carriers for Full Damages for Tug Negligence

"I like the Walrus best," said Alice: "Because he was a little sorry for the poor oysters."

"He ate more than the Carpenter, though," said Tweedledee.

"You see he held his handkerchief in front, so that the Carpenter couldn't count how many he took; contrariwise."

Through the Looking-Glass, Lewis Carroll

As at the trial, States Marine is on this appeal the man in the middle of a cross-ruff. The American concept of litigation as an adversary proceeding meets its most difficult test where, as here, nominally adversary parties fail to litigate as adversaries. The briefs of Victory Carriers and Red Stack continue the concordat commenced in the trial court under which Red Stack concedes liability to Victory Carriers (Rep. Tr. p. 134, not printed) for full damages (in the trial court such concession was premised on pilot negligence although Victory Carriers' libel was premised on tug negligence) and Victory Carriers assists Red Stack in its efforts to recover indemnity from States Marine.

Only two portions of Red Stack's brief require reply.

The first is that portion (Br. 7-8) where Red Stack hopefully suggests that as a matter of burden of proof it was the duty of States Marine to come forward to testify that it was misled by the Red Stack letter of May 4, 1956

in view of the inconsistent invoice contract clauses received by it during the following nine months up to the collision. Any such testimony as to subjective facts would have been inadmissible and excluded as well as unnecessary surplusage. The facts which make a contract are objective facts and the burden of proving such facts is on the party claiming the benefit of the contract. Red Stack clearly failed in proving that the letter of May 4, 1956 was the contract (rather than Imp. Rep. Ex. A, Tr. 66a). It was not States Marine's burden to dignify Red Stack's contention by producing testimony where the objective fact of Red Stack's consistent invoicing practice, which established its contract in *The Jules Fribourg* (N.D. Cal. 1956) 140 F. Supp. 333, was clear and admitted.

The second point asserted by Red Stack is its contention (Br. 12-15) that the stevedoring indemnity cases are inapplicable because they concern implied contracts of indemnity while in the present case the pilotage clause was written. Red Stack appears to urge, erroneously but by way of diversion, that States Marine is suggesting that Victory Carriers' right to full indemnity arose from an implied contract by Red Stack to indemnify with respect to pilot's negligence. On the contrary, States Marine's suggestion is that Victory Carriers, even if bound by a pilotage clause, was entitled to full damages from Red Stack by reason of Red Stack's implied contractual undertaking to indemnify fully for damages resulting from Red Stack's failure to operate its tug SEA SCOUT in a careful and workmanlike manner. Red Stack contracted with States Marine, for the benefit of Victory Carriers, that it would operate its tug carefully. It

breached this contract and is liable for the full collision damages contributed to by that breach. Red Stack fails to propose any basis for distinguishing in principle, with respect to an implied obligation to indemnify for failure to perform work properly, the situation of the stevedoring contractor who has been hired to load a vessel from the situation of the tug SEA SCOUT which was hired to assist in undocking a vessel. None of the collision cases upon which Red Stack relies in its attack on the principle of *Ryan v. Pan-Atlantic* (1956) 350 U.S. 124 discuss the effect of the contractual relationship between the vessel and tug. The decision of the Eastern District of Virginia (1953) in the *Gypsum Queen,* 1953 AMC 2071, not officially reported, indicates a result which is hypothetically attractive to Red Stack. We do not know the arguments presented to the court in the *Gypsum Queen* case. We do know that it was decided before *Ryan v. Pan-Atlantic* (1956) 350 U.S. 124 and before *United States v. Neilson (Christopher Gale/Dauntless)* (1955) 349 U.S. 129 and that the result in the *Gypsum Queen* case is inconsistent with the result in either of the two cases last cited.

Red Stack in urging that Victory Carriers would have been limited to half damages if bound by a pilotage clause attempts to distinguish the result in *The Chattahoochee* (1899) 173 U.S. 540 on the ground that in the *Chattahoochee* case cargo was innocent without any blame imputed to it by contract or otherwise, while in the present case it is asserted that blame would have been imputed to Victory Carriers if Victory Carriers had been bound by a pilotage clause. In Finding XII (Tr. 45) (not attacked) the Trial Court found Victory Carriers wholly without

blame in the navigational facts leading up to the collision. The U. S. Supreme Court in *United States v. Atlantic Mutual Ins. Co. (Esso Belgium/Nathaniel Bacon)* (1952) 343 U.S. 236 held invalid as against public policy a carrier's attempt by contract to divest cargo of a portion of the recovery to which it was entitled under the *Chattahoochee* against the non-carrying vessel. In the *Esso Belgium* case the principle of full recovery under the *Chattahoochee* was held to prevail against the attempt of the carrier to defeat it through use of the both-to-blame collision clause. We do not urge that the holding in the *Esso Belgium* is necessarily of itself controlling in the present case. We do urge that the doctrines of public policy relating to common carriers which dictated the result in that case are equally applicable to and controlling in the present situation which involves an attempt by Red Stack to avoid a portion of its liability for damages resulting from negligent operation of its tug. It is established public policy that a tug may not by contract exempt itself from liability for negligent injury to its tow. *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85.

III

STATES MARINE WAS AUTHORIZED TO BIND VICTORY CARRIERS TO A PILOTAGE CLAUSE DESPITE THE CONTRARY POSITIONS OF VICTORY CARRIERS AND OF RED STACK

O world! world! world! thus is the poor agent despised.

Troilus and Cressida, Act V, Scene 10, Line 36

Qui facit per alium facit per se

Victory Carriers contends that States Marine was not authorized to bind it to a pilotage clause. Red Stack (Br. 3-4) as amicus Victory Carriers states a similar position. States Marine affirms its analysis (Appellant's Opening Brief pp. 25-31) of each of the cases which has dealt with the question of a time charterer's authority to bind the vessel owner to a pilotage clause and confirms the representation made in its opening brief that there has been no direct holding by any court as a necessary ground of decision that a time charterer lacks authority to bind a vessel owner to the terms of a pilotage clause usual in the port. The time charter establishes the authority of the time charterer to bind the vessel owner to a usual pilotage clause consistent with the owner's undertaking "to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account."

Dated, July 2, 1959.

Respectfully submitted,

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